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Respondents.

REPORT AND RECOMMENDATION

Arthur Roy Mayhan filed a petition for writ of habeas corpus on July 22, 2009, challenging his conviction in Maricopa County Superior Court for aggravated taking the identity of another, and the imposition of an aggravated 14-year term of imprisonment. He raises four grounds for relief. Although it is unclear to the Court what grounds he is raising, it appears that he is asserting two arguments concerning the ineffective assistance of counsel, an argument that the trial court imposed an improper sentence, and a contention relating to the execution of a search warrant. Respondents contend that Mayhan's petition is untimely and in the alternative that his claims are unexhausted and procedurally defaulted. The Court agrees that the petition is untimely, and that Mayhan has not shown he is entitled to any statutory or equitable tolling. The Court therefore recommends that Mayhan's petition be denied and dismissed with prejudice.

Following the trial court's acceptance of Mayhan's guilty plea, and the imposition of sentence, Mayhan filed a Notice of Post-Conviction Relief on May 7, 2007 (Doc. #15, Exh

1 C). Counsel was appointed on May 16, 2007; on February 14, 2008, counsel filed a Notice
2 of Completion of Review finding no colorable claims (*Id.*, Exh D, E). On February 20, 2008,
3 the trial court gave Mayhan 45 days up to and including April 5 to file a pro per petition; he
4 was warned that a failure to timely file his petition could result in dismissal (*Id.*, Exh F). On
5 May 5, 2008, the trial court dismissed Mayhan's Rule 32 proceeding because Mayhan had
6 failed to file a petition by the April 5 deadline (*Id.*, Exh G).

7 In July 2008, Mayhan filed with the Arizona Supreme Court a pleading entitled
8 "Petition for Review" and one entitled "Motion to Quash Warrant." The pleadings were
9 returned to Mayhan on August 11, 2008, with instructions to file them in the court of appeals
10 (*Id.*, Exh H). On August 13, 2008, the supreme court received another pleading from
11 Mayhan, asking about the status of his earlier pleadings; this was also returned to Mayhan,
12 with an explanation for the court's rejection of the earlier documents (*Id.*, Exh I). During
13 July 2008, Mayhan also mailed two pleadings entitled "Special Action" to the supreme court;
14 both were dismissed by the supreme court, with instructions to Mayhan that "such claims
15 should be presented to the superior court in compliance with Rule 32" (*Id.*, Exh J-L).
16 Mayhan filed his federal petition on July 22, 2009.

17 Mayhan was required to file his federal petition within one year of the "date on which
18 the judgment became final by the conclusion of direct review or the expiration of the time
19 for seeking such review." 28 U.S.C. § 2244(d)(1)(A); *Jimenez v. Quarterman*, 129 S.Ct.
20 681, 685 (2009). However, "[t]he time during which a properly filed application for State
21 post-conviction or other collateral review with respect to the pertinent judgment or claim is
22 pending shall not be counted toward any period of limitation under this subsection." *See* 28
23 U.S.C. § 2244(d)(2). Assuming that Mayhan's post-conviction proceedings in superior court
24 constituted a "properly filed application" for purposes of § 2244(d)(2), even though a petition
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1 was never filed,¹ any tolling of the one-year period ended when the deadline for filing his
2 petition expired on April 6, 2008. Therefore, absent any further statutory tolling, he was
3 required to file his federal petition on April 6, 2009. The time period in July 2008 when he
4 was attempting to file pleadings in the supreme court did not further toll the limitations
5 period; the supreme court never filed the pleadings, rejecting them as not properly filed. His
6 petition, filed on July 22, 2009, was therefore untimely, absent any equitable tolling.

7 The Court concludes that Mayhan is not entitled to equitable tolling. He has not
8 demonstrated the existence of any extraordinary circumstances which prevented him from
9 timely filing his petition. *Pace v. DiGuglielmo*, 544 U.S. 408, 418-19 (2005). Mayhan was
10 informed by the superior court of his need to timely file a pro per petition in order to avoid
11 dismissal of the Rule 32 proceeding. He does not contend that he misunderstood this
12 requirement. He simply chose not to file a petition. In addition, he was again informed by
13 the supreme court of his need to file his petition for review in the court of appeals; again he
14 chose not to do so.

15 Following the time allowed by the Court for briefing, Mayhan filed a pleading entitled
16 “Motion to Vacate Plea Agreement.” See Doc. #22. Again, it is unclear what Mayhan is
17 contending, but it appears that he is attempting to raise new issues without having received
18 leave of the Court. For that reason, his motion will be denied.

19 **IT IS THEREFORE ORDERED denying** Arthur Roy Mayhan’s Motion to Vacate
20 Plea Agreement (Doc. #22).

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23 ¹A state prisoner could file a Notice of Post-Conviction Relief simply to toll the
24 limitations period, without ever filing a petition within the time period allowed by the state
25 court. If an untimely petition for post-conviction relief does not toll the one-year limitations
26 period, *Pace v. DiGuglielmo*, 544 U.S. 408, 412-415 (2005), an argument can be made that
27 the failure to file any petition at all should also not toll the period. However, because of the
28 Court’s conclusion that the petition is untimely under either calculation, it need not reach the
issue.

1 **IS FURTHER RECOMMENDED** that Arthur Roy Mayhan's petition for writ of
2 habeas corpus be **denied** and **dismissed with prejudice** (Doc. #1).

3 **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave
4 to proceed *in forma pauperis* on appeal be **denied** because dismissal of the Petition is
5 justified by a plain procedural bar and jurists of reason would not find the ruling debatable.

6 This recommendation is not an order that is immediately appealable to the Ninth
7 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
8 Appellate Procedure, should not be filed until entry of the district court's judgment. The
9 parties shall have fourteen days from the date of service of a copy of this recommendation
10 within which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1);
11 Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen
12 days within which to file a response to the objections. Failure timely to file objections to the
13 Magistrate Judge's Report and Recommendation may result in the acceptance of the Report
14 and Recommendation by the district court without further review. *See United States v.*
15 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any
16 factual determinations of the Magistrate Judge will be considered a waiver of a party's right
17 to appellate review of the findings of fact in an order or judgment entered pursuant to the
18 Magistrate Judge's recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

19 DATED this 19th day of March, 2010.

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24 David K. Duncan
25 United States Magistrate Judge
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